STATE OF MICHIGAN

COURT OF APPEALS

SONYA NORTHERN,

Plaintiff-Appellant,

v

NATIONAL BANK OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
March 31, 2000

No. 206646
Wayne Circuit Court
LC No. 96-642111 CL

Before: Kelly, P.J., and Jansen and White, JJ.

JANSEN, J. (dissenting).

I respectfully dissent and would reverse the trial court's ruling. Contrary to the majority's holding, I would find that there is a genuine issue of a material fact with respect to whether plaintiff suffered from a serious health condition as that term is defined under the Family and Medical Leave Act (FMLA), 29 USC 2601 *et seq*.

Plaintiff filed this suit, alleging claims of race discrimination, retaliatory discharge for filing a worker's compensation claim, and discharge in violation of the FMLA. Defendant subsequently moved for summary disposition on all three claims. At the motion hearing, plaintiff abandoned her claims of race discrimination and retaliatory discharge. The trial court granted defendant's motion with regard to the claim under the FMLA, ruling that plaintiff failed to establish that the two absences on February 17 and 18, 1996 were the result of a serious health condition within the meaning of the FMLA.[1]

No Michigan law exists interpreting the FMLA and because the FMLA is a federal statute, I turn to federal cases for guidance. The fundamental purposes of the FMLA are to entitle employees to take reasonable leave for medical reasons and to help working people balance the conflicting demands of work and personal life. 29 USC 2601(b)(1), (2); *Hodgens v General Dynamics Corp*, 144 F3d 151, 159 (CA 1, 1998); *Price v Fort Wayne*, 117 F3d 1022, 1024 (CA 7, 1997). The FMLA is a remedial statute and, as such, should be construed broadly to effectuate its purposes. *Hodgens, supra* at 164.

To make out a prima facie case of retaliation under the FMLA, a plaintiff must show that (1) she availed herself of a protected right under the FMLA; (2) she was adversely affected by an employment

decision; and (3) there is a causal connection between the employee's protected activity and the employer's adverse employment action. *Hodgens, supra* at 161. The first element is the one at issue in this case. Plaintiff claims that, contrary to the trial court's ruling, her hypertension qualified as a serious health condition under the FMLA.

The FMLA entitles an employee to twelve workweeks of leave during any twelve-month period because of a serious health condition that makes the employee unable to perform the functions of the position of the employee. 29 USC 2612(a)(1)(D). "Serious health condition" is defined in the act as "an illness, injury, impairment, or physical or mental condition that involves"

> (A) inpatient care in a hospital, hospice, or residential medical care facility; or
>
> (B) continuing treatment by a health care provider. [29 USC 2611(11).]

Plaintiff contends that she received continuing treatment by a health care provider for her hypertension so that she is an eligible employee under the act. I agree with plaintiff in this regard that she suffered from a serious health condition as that term is defined in the act. The Department of Labor regulations, CFR 825.114(a)(2), provide the following with respect to the definition of "continuing treatment by a health care provider"

> (2) ***Continuing treatment*** by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:
>
> * * *
>
> (iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:
>
> (A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
>
> (B) Continues over an extended period of time (including recurring episodes of a underlying condition); and
>
> (C) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

I believe that a jury could find that plaintiff suffers from a chronic serious health condition as that term in defined in the regulations. Here, there is documentary evidence that plaintiff saw a doctor on February 16, 1996, was diagnosed with hypertension, and there is an indication in the medical records that plaintiff has a history of hypertension. Further, her doctor advised her to follow up to determine if medication was needed. This evidence fits within the regulation's requirements for a "chronic serious health condition." That is, plaintiff's condition requires periodic visits for treatment by a health care

provider, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity. See, e.g., *Hodgens, supra* at 161-163.

Accordingly, the trial court erred in ruling that plaintiff did not suffer from a serious health condition as that term is defined in the FMLA. Plaintiff has presented evidence that she suffers from hypertension and such a medical problem could be considered by a jury to be a chronic serious health condition as defined in the regulations. Further, there is documentary evidence that plaintiff's doctor advised "no work at all" from February 16 to February 18, 1996. Therefore, plaintiff has presented evidence to satisfy the first element of a prima facie case of retaliation under the FMLA by availing herself of a protected right under the FMLA because the leave she took in February 1996 was due to a chronic serious health condition.[2]

Next, to the extent that defendant argues that plaintiff did not provide it with sufficient notice of FMLA leave, I would also reject that argument. When requesting unpaid leave, the employee need not mention the FMLA. *Stoops v One Call Communications, Inc,* 141 F3d 309, 312 (CA 7, 1998), citing 29 CFR 825.303(b). Rather, it is sufficient notice if the employee provides the employer with enough information to put the employer on notice that FMLA-qualifying leave is needed. *Stoops, supra* at 312; *Price, supra* at 1025-1026; *Manuel v Westlake Polymers Corp,* 66 F3d 758, 764 (CA 5, 1995). Under CFR 825.311(b), when the need for leave is not foreseeable, the employee must provide certification within the time frame requested by the employer (and the employer must allow at least fifteen days after its request), or as soon as reasonably possible under the circumstances.

In the present case, plaintiff clearly provided defendant with sufficient notice of FMLA leave. Affidavits of Loretta Jenkins, plaintiff's supervisor, and Connie Hayes, the employee relations counselor, indicate that plaintiff called in sick on February 17 and February 18, 1996 and informed her supervisor that her doctor had put her on medication for high blood pressure. The medical records likewise indicate that plaintiff's doctor put her on Plendil. When plaintiff returned to work on February 26, 1996, she gave her supervisor a copy of the doctor's recommendation that she not work from February 16-18, 1996. Jenkins then contacted Hayes to determine whether these absences qualified as leave under the FMLA. This was sufficient information to put defendant on notice that plaintiff's absences were FMLA leave, see e.g., *Price, supra* at 1025, and, it is apparent that plaintiff's supervisor understood the absences as being FMLA leave.

I would reverse and remand for further proceedings.

/s/ Kathleen Jansen

[1] I note that, despite this Court's attempts to obtain the transcript of the summary disposition motion hearing, appellant has failed to provide this Court a copy of that transcript. Thus, we are unable to review the trial court's specific ruling. However, there is no dispute in the briefs that the trial court granted summary disposition in favor of defendant finding that plaintiff's absences were not because of a serious health condition within the meaning of the FMLA.

[2] The other elements of a prima facie case of retaliation under the FMLA need not be decided at this time because those issues were not raised or decided below. See, e.g., *Hodgens, supra* at 160-161.